

**1 October 2004**

<sup>3</sup> Opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978). Available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions>.

Situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature are not included within this definition.<sup>4</sup>

The authority to exercise military jurisdiction to try law of war violations lasts “. . . so long as a state of war exists-from its declaration until peace is proclaimed.”<sup>5</sup> While the Supreme Court has allowed military commission jurisdiction to continue after the end of hostilities, it has done so only in limited circumstances, such as when U.S. forces formally occupy foreign territory, or when the U.S. is part of a power-sharing governmental arrangement.<sup>6</sup> Absent either of these circumstances, military commission jurisdiction exists only during the “. . . time of war.”<sup>7</sup>

The conflict in Afghanistan between the governing authority in Afghanistan, the Taliban regime, and the United States that occurred in 2001 was an international armed conflict. With the Taliban’s final surrender in Kandahar on 17 November 2001, and the establishment of a new government, the international armed conflict ceased. Under the Bonn agreement, the Afghanistan Interim Authority (AIA) was formed and assumed office on 22 December 2001,<sup>8</sup> as the recognized Government of Afghanistan. The United States never occupied Afghanistan. The AIA was renamed the Transitional Islamic State of Afghanistan (TISA). The TISA constitution was ratified on 4 January 2002.<sup>9</sup>

After 22 December 2001, the conflict in Afghanistan ceased to be an international armed conflict because there was no longer an armed conflict “between two or more” States; in fact, the AIA has never engaged in an armed conflict with the United States. Since January 2002, contingents of foreign peacekeepers and U.S. troops have continued to assist in maintaining order in Afghanistan. Any violence that continued was not in the nature of an international armed conflict because those engaging in violence against peacekeepers and U.S. troops did not represent a State. Further, the periodic fighting in the TISA did not amount to a non-international armed conflict, because those engaging in violence were no longer under responsible command

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<sup>4</sup> Article 1 states: “1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol. 2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”

<sup>5</sup> *In re Yamashita*, 327 U.S. 1, 11 (1946).

<sup>6</sup> *Madsen v. Kinsella* 343 U.S. 341, 348 (1952). The President has the urgent and infinite responsibility not only of combating the enemy but of governing any territory occupied by the United States by force of arms.”

<sup>7</sup> *Id.* at 348.

<sup>8</sup> See U.S. State Department, “Background Note: Afghanistan,” available at <<http://www.state.gov/r/pa/ei/bgn/5380.htm>>.

<sup>9</sup> See “Karzai takes power in Kabul,” BBC News (22 December 2001), available at <[http://news.bbc.co.uk/1/hi/world/south\\_asia/1724641.stm](http://news.bbc.co.uk/1/hi/world/south_asia/1724641.stm)>. See also “Whitbeck: Afghanistan’s historic day,” CNN (22 December 2001), available at <<http://www.cnn.com/2001/WORLD/asiapcf/central/12/22/ret.whitbeck.otsc/>>.

(since the Taliban organization collapsed in December 2001), nor were they in control of part of Afghanistan's territory.<sup>10</sup> The periodic fighting in TISA constituted neither sustained nor concerted military operations. Any periodic clashes in the TISA after December 2001 have been internal disturbances, or sporadic acts of violence.

Because the international armed conflict in Afghanistan has ended, so has the authority, under the law of war, to convene military commissions. Therefore, this commission lacks jurisdiction to try Mr. Hicks for any offense.

**4. Evidence:**

A: The testimony of expert witnesses.

B: Attachments

1. *Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field*, Article 2.
2. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*, Article 1.
3. U.S. State Department, "Background Note: Afghanistan."
4. "Karzai takes power in Kabul," BBC News (22 December 2001).
5. "Whitbeck: Afghanistan's historic day," CNN (22 December 2001).

**5. Relief Requested:** The defense requests that all charges be dismissed.

6. The defense requests oral argument on this motion.

By: \_\_\_\_\_

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<sup>10</sup> See U.S. State Department, "Background Note: Afghanistan," available at <<http://www.state.gov/r/pa/ei/bgn/5380.htm>>.